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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BYRON DAVID BENSMAN,

Defendant and Appellant.

D055348

(Super. Ct. No. SCS220949)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Rubin, Judge. Affirmed.

Byron David Bensman entered negotiated guilty pleas to one count of attempted murder (Pen. Code,¹ §§ 187, 664) and two counts of solicitation of murder (§ 653f, subd. (b)). The plea bargain called for a stipulated prison term of 13 years, immediate sentencing and dismissal of a conspiracy to commit murder count. The trial court sentenced Bensman in accordance with the plea bargain.

¹ Statutory references are to the Penal Code.

FACTS

On July 3, 2008, Bensman offered John McCann \$5,000 to kill his former business partner, William Flores. McCann lived in Bensman's apartment for free and did odd jobs for him. Bensman and McCann discussed various methods of killing Flores and decided Flores should be stabbed in the throat. Bensman gave McCann a knife. McCann needed transportation and recruited Christopher Chur to drive him to Flores's house. McCann falsely told Chur that he was going to kill someone who had raped a friend's daughter. Later, Chur met with Bensman, who told him that the intended murder target was his former business partner; the intended target was not a rapist, as McCann had said. Bensman and Chur then discussed the actual plan.

McCann decided he could not go through with the plan and turned himself in to sheriff deputies. Sheriff deputies asked McCann to make a recorded telephone call to Bensman and to wear a wire while talking in person to Chur and later Bensman.

On July 10 at 4:00 a.m., Chur picked up McCann at Bensman's residence. After Chur started to drive to Flores's house, sheriff deputies pulled them over. McCann was armed with a knife. There was a club behind the seat and knives in the trunk.

DISCUSSION

Appointed appellate counsel has filed a brief summarizing the facts and proceedings below. Counsel presents no argument for reversal, but asks this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel refers to as possible, but not arguable, issues: (1) whether there was a factual basis for the guilty plea; (2) whether

Bensman adequately waived his jury trial rights before pleading guilty; and (3) whether the trial court adequately advised Bensman about the statutory limitation on postjudgment custody credits.

We granted Bensman permission to file a brief on his own behalf, and he has responded. Bensman claims that he did not solicit McCann and Chur to commit murder; it was McCann's idea. Bensman further claims he offered McCann \$5,000 to enable him to move out of the apartment and set up his own residence. Bensman also faults trial counsel for not supplying documents to him, failing to adequately investigate the case, misrepresenting various aspects of the plea bargain, including that he could earn prison credits to reduce his sentence by half. According to Bensman, he should be allowed to withdraw his guilty plea.

First, Bensman, in essence, is claiming he is not guilty of the crimes to which he pleaded guilty. "[A]n accused's claim of innocence does not preclude entry of a guilty or nolo contendere plea where the court taking the plea ascertains a 'factual basis' therefor." (*In re Alvernaz* (1992) 2 Cal.4th 924, 940, fn. 9; see also *People v. McGuire* (1991) 1 Cal.App.4th 281, 283 [factual basis inquiry may be satisfied by stipulation of parties that there is a factual basis]; (*People v. Watts* (1977) 67 Cal.App.3d 173, 180.) To establish the requisite factual basis for the plea, nothing more than a prima facie factual basis is required. (*People v. Calderon* (1991) 232 Cal.App.3d 930, 935.) Here, the parties stipulated that the preliminary hearing transcript provided a factual basis for the guilty pleas. Our recitation of the facts above, which are taken solely from the preliminary

hearing transcript, shows there was, at the very least, a prima facie factual basis for the guilty pleas.

To the extent that Bensman is claiming he received ineffective assistance of counsel at the trial level, he cannot prevail. In order to succeed on a claim of ineffective assistance of counsel, a defendant must show counsel's performance fell below an objective standard of reasonableness and actual prejudice flowing from counsel's performance, i.e., a reasonable probability of a different result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692.) A claim of ineffective assistance of counsel here would be without merit. Benson received a highly favorable disposition, and it is clearly within the range of reasonable assistance to have supported a case disposition limiting defendant's sentence to 13 years in prison, considering that his maximum exposure if he were convicted of conspiracy to commit murder would have been 25 years to life in prison. As to Bensman's claim that counsel told him he would only have to serve half of his sentence, the record shows that on the change of plea form Bensman indicated by initialing the appropriate box that counsel had explained to him that he would be limited to prison credits of 15 percent—not 50 percent—because he was pleading guilty to a violent felony.

A review of the record pursuant to *People v. Wende*, *supra*, 25 Cal.3d 436, and *Anders v. California*, *supra*, 386 U.S. 738, including the possible issues referred to by appellate counsel, has disclosed no reasonably arguable appellate issues. Bensman has been adequately represented by counsel on this appeal.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.